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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 699

JAMES BUCHANAN HILL,
Petitioner

vs.

THE STATE OF TEXAS
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN BEN SHEPPERD
Attorney General of Texas

ROBERT O. FAGG
Assistant
Capitol Station
Austin, Texas

Attorneys for Respondent

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Opinions Below

The opinions of the Court of Criminal Appeals of Texas are not yet printed. They appear, however, in Petitioner's brief in the Appendix thereto, pp. 13-20.

Jurisdiction

Petitioner has not invoked the jurisdiction of this Court under 28 U.S.C. 1257(3) for the following reasons:

1. Nowhere in the record, and particularly in Petitioner's informal Bills of Exception, did Peti-

tioner specially set up or claim any title, right, privilege or immunity under the Constitution of the United States.

3. The grounds of error here presented were never urged in any definite manner before the trial court and under the rules of practice in the Court of Criminal Appeals in Texas, the latter Court could not consider such alleged errors, and this Court is without power to consider Federal questions not raised in accordance with the requirements of State laws.

3. The decision of the Texas Court of Criminal Appeals rests upon adequate non-federal grounds.

4. The Fourth and Fifth Amendments to the United States Constitution applies only to the Federal government and not to State officers.

Argument and Authorities on Jurisdiction of the Supreme Court

No federal question of merit or otherwise has been raised within the meaning of 28 U.S.C. 1257(3), and the prior decisions of this Honorable Court. As a consequence, this Court has no jurisdiction to hear the cause.

Contra to his assertions, Petitioner did not specially set up or claim any right, title, privilege or immunity.

Nowhere in the entire record in the trial court of this case does Petitioner alleged a violation of the Fourth, Fifth, or Fourteenth Amendments. Petitioner has 40 informal bills of exception which allege only that the evidence used herein was illegally ob-

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tained under the Federal and State Constitutions and under the Code of Criminal Procedure of the State of Texas. Articles 212 through 215, inclusive, and Article 727a. This same objection is made throughout the trial.

In Petitioner's brief before the Texas Court of Criminal Appeals and in his Motion for Rehearing the same general objection is urged. The transcript reveals no formal Bills of Exception on any constitutional issues.

Since there are no specific alleged violations of the United States Constitution that the Texas Court of Criminal Appeals could possibly pass upon, there is no doubt but that they decided the case upon adequate non-federal grounds.

In view of these pronouncements and the adherence of this Honorable Court to a well defined policy requiring any Federal question to be "specifically set up or claimed" the Petitioner has never invoked the jurisdiction of this Court. His only objection being so broad as to say in effect that his arrest is in violaiton of the United States Constitution, and he gave the trial and appellate courts below nothing to decide and such having occurred, this Court is without a jurisdictional basis to grant a writ of certiorari or to review the prior proceedings in any manner. Furthermore, the Court of Criminal Appeals based its decision entirely upon non-federal grounds and did not consider any question relating to a violation of the Fourteenth Amendment. As stated in *Lynch v. New York*, 293 U.S. 52 (1934):

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a

> State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it."

Furthermore, where it appears that the judgment of the State court *might* have rested on a non-federal ground, this Court will not take jurisdiction. *Stembridge v. Georgia*, 343 U.S. 541 (1952).

It is well established that the Fourth Amendment to the United States Constitution does not apply to the States. *U. S. v. Smith*, 23 F. Supp. 528 (1938). It is also well established that the Fifth Amendment does not apply to the States. *Ex parte Ceja*, 52 F. 2d 635 (1931). *Simons v. Galveston, H. & S. A. Ry. Co.*, 57 S.W. 2d 199 (Tex. Civ. App. 1933, Dismissed).

Furthermore, no jurisdiction could arise through the Fourteenth Amendment. In *Wolf v. Colorado*, 338 U.S. 25 (1949) this Court stated:

> "We hold, therefore, that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure."

It is submitted that the Court of Criminal Appeals of Texas in this case did not find it necessary to base its decision on the merits, if any, of a federal claim or claims, if any, but that adequate State grounds

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existed for final determination of the cause. Jurisdiction is a province of this Court and cannot be conferred by statute.

Statement

Appellant was convicted in the District Court of Johnson County, Texas, for the offense of unlawfully possessing and having in his control a bomb, in violation of Article 1723 of Texas Penal Code (Vernon 1948), and assessed punishment of confinement in the State penitentiary for a term of five years.

The State's testimony reflects that on the night of December 6, 1952, between 7:30 p.m. and 8:00 p.m., the State's witness, L. E. Smith, parked his automobile on the East side of the Prescription Pharmacy on James and Caddo Street in the City of Cleburne, Texas, and then went to the Yale Theatre with his family. That the witness Smith and his family came out of the theatre around 10 o'clock p.m. and went to their automobile and as he approached the car, he saw two men standing between his car and a 1950 green Oldsmobile which was parked next to his automobile. The witness stopped and one of the men ran around and got in the back of the Oldsmobile and the other man ran around in front of another car and got in the front seat of the Oldsmobile. The man who got in the front seat of the Oldsmobile as he was running around the other car was stooped over and running real low and carrying a little grip of some kind. The witness Smith testified that he later learned that the man who was carrying the grip

was named Glenn Roach and at the time he observed the two men get in the Oldsmobile he made a mental notation of the license number of the Oldsmobile and that he then backed his car out and went to the jail to find some officers. That no officers were at the jail and as he left the jail he then saw Officers Bob Kimbrell, Cliff Benson and Harold Nelson, and told them what he had seen and described the automobile, giving them the license number. The witness Smith testified that on the following day at the police station he saw the men whom he had seen with the satchel getting in the Oldsmobile and also observed and identified the Oldsmobile automobile at the police station, and testified that he did not identify the appellant as being one of the men in the car the previous night. (S.F. pp. 4-14.)

The State's witness, Harold Nelson, who was a City of Cleburne officer on December 6, 1952, testified that around 10 p.m. on the night in question the State's witness Smith came to him and officers Kimbrell and Benson and gave them a description and the license number of a car. The witness Nelson testified on voir-dire examination, out of the presence and hearing of the jury, that Smith told him and the two other officers that he had seen the two men acting suspicious around his car at the Prescription Pharmacy and suggested that they might have been steeling hub caps from automobiles. The witness testified that he and his two fellow officers then proceeded down Caddo Street toward the Yale Theatre and that they saw two men on the street in front of the Prescription Pharmacy as they passed, and saw an automobile which resembled the description which

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had been given them by Smith parked in front of the James Street Clinic, with a man sitting under the steering wheel, which automobile was described by the witness as a 1950 two-tone green automobile. That the officers turned around and as they returned toward the Prescription Pharmacy the Oldsmobile automobile had begun to move and they observed the two men who were standing in front of the Prescription Pharmacy get in the front seat, and the car drive away. That the officers followed and stopped the Oldsmobile automobile some six blocks away, and appellant got out of the car and came back to the police car. Officer Nelson testified that he got out of the police car and went to the Oldsmobile, approaching on the right front side; and testified on voir-dire examination, outside of the presence and hearing of the jury, that he could smell whiskey on the breath of the three parties in the Oldsmobile and that he could see a bag containing tools on the front floorboard inside the car. Officer Nelson testified that at the time the Oldsmobile car stopped appellant was under the stering wheel; a man by the name of Glenn Roach was seated in front in the middle; and a man by the name of Mack Barnes was seated on the right front side. That he took the bag out of the car, which was on the right hand front floor board and which he could see from the outside, and which he described as being a small zippered blue color canvas bag, which contained therein a small cellophane bag; a jelly-like substance which the witness identified as nitro glycerin; a wire with a copper detonating cap; a small wad of cotton; another wire and detonating

cap; pair of cotton gloves on top of the bag; a screw driver; pair of pliers; a small crowbar and two drift punches; a chisel and hatchet; a hammer which was partially in the bag with the handle sticking out; a tire tool in the back seat of the car; and a pint of Seagram's Whiskey, which had been partially consumed, in the top of the canvas bag. All of these items were introduced in evidence by the State after being identified by the witness Nelson as being the articles taken from the car driven by appellant on the night in question at the time of appellant's arrest in the City of Cleburne. Deputy Sheriff Boyd Cook testified that he received from Officer Nelson some jelly-like substance and some wire and a cap and cotton, which he took to the Department of Public Safety at Austin and delivered it to R. E. Tullis. (S.F. 46-65, 119-124, 143.)

The State's witness, R. E. Tullis, who was a chemist and toxicologist of the Department of Public Safety with the duties of examining objects and substances of material sent to the department, testified that he received the substances from Officer Cook on January 1, 1953, consisting of a lump of jelly-like substance and electric blasting cap. That he ran a test to determine if the same was an explosive and the nature of the explosive, and after running several tests of the jelly-like substance, it was determined that the substance contained nitro glycerin. Chemist Tullis then further testified that he made a detonating test with the jelly substance and the wire and the cap, which test resulted in an explosion, and expressed his opinion that the amount of substance

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delivered to him could have caused the death of a person and considerable damage to property.

Appellant, as a witness in his own behalf, testified that on December 6, 1952, he lived in Dallas and that on the morning of that day he had an argument with his wife and that after the argument he went to work and returned home between 3 and 4 o'clock p.m. and found no one at home. That he made several efforts by telephone to locate his wife and then went to the home of Glenn Roach at Grand Prairie in an effort to locate his wife. That when he arrived at the Roach home both Glenn Roach and Mack Barnes were present, and after telling them that he was going to Cleburne, they decided to go with him. That the three left appellant's home in Dallas about 8 o'clock p.m. and drove to Cleburne and upon arrival in Cleburne appellant went to the Yale Theatre, thinking that he could locate his wife at the show. That appellant got out of the car and stood around the show some fifteen minutes. That Roach and Barnes stood in front of the show and appellant returned to his car, backed out from the curb, and picked Roach and Barnes up and drove away. Appellant testified that at the time he was stopped by the officers, he was driving and that Barnes was seated in the back seat of the car and Roach was seated in the front with appellant. Appellant testified that he did not know that the zippered bag or its contents was in his automobile and that he at no time had possession of nitro glycerin or a bomb and did not see the bag and its contents until the same was shown to him at the police station after his arrest.

The State offered in rebuttal the testimony of Officers Benson and Kimbrell, who testified that after appellant's arrest at the police station the appellant was shown the zippered bag and contents which were taken out of his automobile and when asked if it was his he stated, "I guess it is. It is in my car," and when asked what he was doing with it, appellant stated, "The stuff belongs to me. I am just going to take it up here and give it to my relative, my cousin."

Appellant, testifying in rebuttal, denied having told the officers that the zippered bag and contents found in his car belonged to him and denied having stated that he was going to take it to some of his relatives.

The record presents appellant's motion to quash the indictment and application for a change of venue, which motions, were by the Court overruled; appellant's requested instructions, Nos. 16, 17 and 18, which were by the Court refused and 40 informal bills of exceptions indexed in the Statement of Facts.

Questions Presented by Respondent

1. Assuming, *arguendo*, that jurisdiction exists, was the arrest of Petitioner herein illegal?

2. Assuming, *arguendo*, that jurisdiction exists, was the evidence acquired in the above arrest admissible?

Respondent's argument in regard to the above questions appears immediately below. Argument on Petitioner's "Questions Presented" as set out on page 4 of his brief follows thereafter.

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Argument

Article 1, Section 9 of the Texas Constitution reads as follows:

> *"No Unreasonable Seizures and Searches Allowed—*
>
> "The people shall be secure in their persons, houses, papers and possessions from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation."

There has been no violation of the Texas Laws or Constitution, nor the Federal Constitution or Laws. Probable cause for the arrest is shown. (S.F. pp. 43-44.) Upon information from a credible person, the police officer made the arrest and search.

The facts and circumstances within the knowledge of the arresting officer and of which he had reasonably trustworthy information were sufficient to warrant a man of reasonable caution that probable cause existed. *Carroll v. U. S.*, 267 U.S. 132 (1925), *State v. Vilott*, 1 S.W. 2d 827 (1929); *Pruett v. State*, 114 Tex. Crim. 44, 24 S.W. 2d 41 (1930); *Minor v. State*, 153 Tex. Crim. 242, 219 S.W .2d 467 (1949); *Rutherford v. State*, 135 Tex. Crim. 530, 121 S.W. 2d 342 (1938); *Bevins v. State*, 110 Tex. Crim. 52, 7 S.W. 2d. 532 (1928); *Jones v. State*, 122 Tex. Crim. 344, 55 S.W. 2d 560 (1932).

Article 214, Texas Code of Criminal Procedure (Vernon 1948), reads as follows:

> "The municipal authorities of towns and cities *may* establish rules authorizing the arrest, without warrant, of persons found in suspicious places, and under circumstances which reasonably show that such persons have been guilty of some felony or breach of the peace, or threaten, or about to commit some offense against the laws."*

Petitioner contends that such rules had not been established by the City of Cleburne. Assuming this to be true, it is submitted that the above article is permissive and not mandatory, and that the duties and powers of a peace officer are set out in Article 37, V.C.C.P., as follows:

> "It is the duty of *every peace officer* to preserve the peace within his jurisdiction. To effect this purpose, he shall use all lawful means. He shall, in every case where he is authorized by the provisions of this Code, *interfere without warrant to prevent or suppress crime.* He shall execute all lawful process issued to him by any magistrate or court. He shall give notice to some magistrate of all offenses committed within his jurisdiction, where he has good reason to believe there has been a violation of the penal law. *He shall arrest offenders without warrant in every case where he is authorized by law,* in order that they may be taken before the proper magistrate or court and be tried.

*Emphasis supplied throughout.

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Then, under Article 215, V.C.C.P., which states:

> "Where it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed, and that the offender is about to escape, so that there is no time to procure a warrant, such peace officer may, *without warrant*, pursue and arrest the accused."

It is then the officers' duty to pursue and capture the offender and to seek all possible information. *Agnello v. U. S.* 269 U.S. 20 (1925); *Hill v. State*, 37 Tex. Crim. 415, 35 S.W. 660 (1896); *Cortez v. State*, 47 Tex. Crim. 10, 83 S.W. 812 (1904).

It is clear then that under the general laws of the State of Texas (Art. 37, V.C.C.P.) that the peace officers were acting within the scope of their authority by law already occupied by legislative enactments. The city charter was not inconsistent with the general laws of Texas relating to the same matters or subject. *Leach v. Coleman*, 188 S.W. 2d 220 (Tex. Civ. App. 1945, error ref.) Furthermore, a policeman of a city is a public officer holding his office as a trust from the State, and not as a matter of contract between himself and the city. *Ex parte Preston*, 72 Tex. Crim. 77, 161 S.W. 115 (1913).

Questions Presented by Petitioner

1.

"Does an unreasonable search and seizure by State officers violate the 4th and 5th amendments of the

Federal Constitution where the amendments have been specifically invoked by State statute? [Art. 727a, V.C.C.P.]

2.

"Does an unreasonable search and seizure by State officers in a State prosecution violate the 14th Amendment to the Federal Constitution?

3.

"Does the departure of the Court of Criminal Appeals from established legal rules (illegal evidence rule) in Petitioner's case violate the 14th Amendment, Federal Constitution, where the Court recognizes the rule but fails to enforce it when called for by the facts?"

Counterpoint I in Answer to Petitioner's Point 1

Article 727a, V.C.C.P., has been construed by the Texas Court of Criminal Appeals as relating solely to a question of procedure and has further stated that Texas is not bound by rules applicable in matters of procedure in Federal cases. *Montalbano v. State*, 116 Tex. Crim. 242, 34 S.W. 2d 1100 (1930).

Furthermore, as stated by this Court in *Schwartz v. Texas*, 344 U.S. 199 (1952) at page 203, in construing Article 727a (before the 1953 amendment):

> "It is due consideration but not controlling that Texas has legislated in this field. Our decision would be the same if the Texas courts had pronounced this rule of evidence."

In *Ex parte Ceja*, 52 Fed. 2d 635 (1931) the Circuit Court of Appeals for the Ninth Circuit declared that the Nevada Enabling Act, providing that the Nevada Constitution Convention shall declare that they adopted the Constitution of the United States did not make the Fifth Amendment applicable to procedure in State courts.

Due process requires that the court have jurisdiction. *Pennoyer v. Neff*, 95 U.S. 714 (1877) and that there shall be notice and opportunity for hearing given the parties. *Roller v. Holley*, 176 U.S. 398 (1899). Subject to these two fundamental rules, this Court has sustained all State laws regulating procedure, evidence, and methods of trial as being consistent with due process of law. *Walker v. Souvient*, 92 U.S. 90 (1875); *Caldwell v. Texas*, 137 U.S. 692 (1891); *Leeper v. Texas*, 139 U.S. 462 (1891); *In re Duncan*, 139 U.S. 449 (1891); and *Twining v. New Jersey*, 211 U.S. 78 (1908). Also—the decision of a state court as to what are the laws of the State is binding upon the courts of the United States. *Leeper v. Texas, supra.*

It is clear then that this rule of evidence, Art. 727a, V.C.C.P., is to be construed as such and by the Texas courts. And further,

> "Whether certain statutes have or have not binding force, it is for the State to determine, and that determination in itself involves no infraction of the Constitution of the United States, and raises no Federal question giving the courts of the United States jurisdiction." *In re Duncan, supra*, at page 462.

Jurisdiction is a province of this Court and cannot be conferred by a state statute.

It is clear, then, that Article 727a does not in and of itself invoke the Fourth and Fifth Amendments to the United States Constitution.

Counterpoint II in Answer to Petitioner's Point 2

Petitioner's question Number 2 is directly answered by *Wolf v. Colorado, supra,* wherein this Court states:

> "We hold, therefore, that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure."

Counterpoint III in Answer to Petitioner's Point 3

The Court of Criminal Appeals of Texas did not depart from any rule of evidence in its decision. It decided the case on adequate State grounds as it was required to do under Texas Rules of Evidence, including Article 727a, as your Respondent has pointed out herein.

Under Petitioner's "Reasons for Granting the Writ," starting on page 7, he cites *Carroll v. U. S., supra,* standing for the proposition that search and seizure of an automobile without proper cause violates the Fourth Amendment. The correct holding in this case is that if the search and seizure without a warrant are made upon probable cause, the search

and seizure are valid. Quoted below are the pertinent parts of this opinion:

> ". . . The Fourth Amendment does not denounce all searches or seizures, but only such as are unreasonable. . . .
>
> "On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid. The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.
>
> ". . . So, also, the laws which provide for the search and seizure of articles and things which it is unlawful for a person to have in his possession for the purpose of issue or disposition, such as counterfeit coin, lottery tickets, implements of gambling, etc., are not within this category [of the Fourth Amendment]. Commonwealth v. Dana, 2 Met. (Mass.) 329. Many other things of this character might be enumerated.
>
> ". . . The guarantee of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant may be obtained, and a search of a ship, motor boat,

wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

". . . The rule for determining what may be required before a seizure may be made by a competent seizing official is not to be determined by the character of the penalty to which the transporter may be subjected.

". . . If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient [to show probable cause.]"

The case of *Silverthorne Lumber Company v. U. S.*, 251 U.S. 385 (1920), cited on page 8 of Petitioners brief, is a case wherein the United States Marshall ". . . *without a shadow of authority* went to the office of their company and made a clean sweep of all the books, papers and documents found there."

This case does not apply to this Petitioner.

In Petitioner's "Summary" on page 9 of his brief, he states that Article 727a, V.C.C.P., makes the decision of *Byars v. U. S.*, 273 U.S. 28 (1927) at page 33, inapplicable.

Here a Federal officer, along with State officers and a *State search warrant* obtained evidence. The search was a joint operation of local and federal officers, and the State officer turned over evidence to the Federal officer which he had discovered, but which was not within the purview of the search warrant.

This Court would not allow the evidence to be used by the Federal officer as it felt that it was an attempt to circumvent the U. S. Constitution. In other words, contra to the general rule, evidence illegally obtained by a State officer could not be used by the Federal government.

It is plain that the fact that State officers made the illegal search and seizure did not take the case out of the Fourth Amendment as Petitioner alleges. The distinction is that this Court applied the Fourth Amendment to the Federal Government, not the State officers, and this is a case which ". . . rests . . . upon its own peculiar facts," as stated on page 33 of the opinion.

Petitioner next cites *Wolf v. Colorado, supra*, on page 9 of his brief for the proposition that the Fourth Amendment is binding on the States. This case dealt exclusively with the Fourteenth Amendment. On page 26, this Court states:

> "The motion that the 'due process of law' guaranteed by the Fourteenth Amendment is shorthand for the first eight amendments of the Constitution and thereby incorporates them has been rejected by this Court again and again, after impressive consideration."
>
> ". . . We hold, therefore, that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure."

Next, Petitioner alleged on page 9 of his brief that Art. 727a may specifically invoke the benefits of the Fourth Amendment and cites two cases in support of this proposition.

The first, *Farrington v. Tokushige*, 273 U.S. 284 (1927), is not in point. It deals with the application of the Fifth Amendment to the Territory of Hawaii. On page 299, this Court says:

> ". . . the inhibition of the Fifth Amendment —'no person shall . . . be deprived of life, liberty or property without due process of law'— applies to the federal government and agencies set up by Congress for the government of the Territory."

The second case cited is *Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1926). This case is not in point. This case concerns the Phillipine Islands and the duty of the United States to protect the rights of those in the Phillippines by virtue of a treaty, and further it involved the construction of a penal statute under the Fifth Amendment. See *Ex parte Ceja, supra.*

Petitioner next cites three cases on page 9 of his brief for the proposition that this writ should be granted because of an alleged unreasonable search and seizure which violates the Fourteenth Amendment.

The first case cited is *Lustiz v. U. S.*, 338 U.S. 74 (1949). This is not in point, having nothing to do with the Fourteenth Amendment. It was a reaffirmation of the *Byars* case, *supra.*

The next case cited is *Wolf v. Colorado, supra.* Again, the direct holding in this case, as set out clearly on page 33, is as follows:

> "We hold, therefore, that in a prosecution in a State court for a State crime the Fourteenth

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> Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure."

Rochin v. California, 342 U.S. 165 (1952). This case deals with convictions obtained by coercion [stomach pump]. Mr. Justice Black wrote a concurring opinion in which he pointed out:

> "What the majority hold is that the Due Process Clause empowers this Court to nullify any State law if its application 'shocks the conscience,' offends 'a sense of justice' or runs counter to the 'decencies of civilized conduct.' "

Mr. Justice Black concurred with the decision of this case, but not the grounds therefor, feeling that the decision should rest on the ground that no person should be compelled to testify against himself.

Petitioner, on page 10 of his brief, cites *Consolidated Rendering Company v. Vermont*, 207 U.S. 541 (1908) at page 552. This opinion was written by *Mr. Justice Peckham* and sustains the State's right to govern its procedural laws, and due process is not violated so long as notice and opportunity to be heard are provided. This case is not in point.

Next is cited *Hammond Packing Co. v. Arkansas*, 212 U.S. 322 (1909) at page 348. This opinion was written by *Mr. Justice White*. This case follows the *Consolidated Rendering Company case*, *supra*, and is essentially the same. This case is not in point.

Next, Petitioner, on page 10 of his brief, cites several State cases. These cases stand for the propo-

sition that there must be probable cause for a search and seizure to be legal. These cases point up the fact that probable cause existed in this case.

The general proposition is that probable cause, for a search and seizure without a warrant, means a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged.

These cases show the absence of probable cause in Texas as follows:

Sheppard v. State, 137 Tex. Crim. 596, 132 S.W. 2d 861 (1939), "There goes a Hopkins County bootlegger."

Gonzales v. State, 148 Tex. Crim. 401, 187 S.W. 2d 910 (1945), "Appellant was arrested upon suspicion. . . ."

Crawford v. State, 148 Tex. Crim. 563, 189 S.W. 2d 871 (1945),

> "Reduced to its final analysis, the information given to the patrolman six weeks before the search amounted only to a general statement that the automobile was being used in transporting stolen property generally over the State. No specific instance, crime, or condition was referred to."

Fowler v. State, 155 Tex. Crim. 342, 235 S.W. 2d 183 (1951),

> "One of the officers testified that as they approached him, appellant 'turned around and saw us and when he saw us, he turned back around and I saw his shoulder duck down like he was putting something under the seat, and he finished parking the car.' "

Nowlin v. State, 125 Tex. Crim. 390, 68 S.W. 2d 496 (1934):

> "On cross-examination the sheriff was asked the direct question if said officers told him that they knew appellant was 'running' whiskey or thought he was, to which the sheriff answered 'I don't remember whether they told me they knew he was . . .' . . . they did not seem to have given him [sheriff] any facts upon which they based their opinion."

The last case cited by Petitioner on page 11 of his brief is *Jones v. U. S.*, 217 F. 2d 381 (Ct. of App. Eighth Cir., 1954) at page 383, wherein the Court states that:

> "This Court will ad here to the rule as stated in the Byars case, on page 33 of 273 U.S. . . . unless and until the Supreme Court has expressly repudiated or explicitly changed it."

Your Respondent submits that the rule in the *Byars* case is sound, as well as the ruling of the above Federal Court, and is not in point so far as Petitioner's case herein is concerned.

Conclusion

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOHN BEN SHEPPERD
Attorney General of Texas

ROBERT O. FAGG
Assistant
Capitol Station
Austin, Texas

Attorneys for Respondent

April ....., 1955

A copy of this reply brief, together with a copy of the letter of transmittal to the Clerk of the Supreme Court of the United States, have been mailed this date to Hon. Charles W. Tessmer, 202 Fidelity Bldg., 1000 Main Street, Dallas, Texas, Attorney for Petitioner, by first class mail, postage prepaid.